

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED

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U.S. DISTRICT COURT
N.D. OF ALABAMA

Case No. CR-00-S-422-S

UNITED STATES OF AMERICA,

vs.

ERIC ROBERT RUDOLPH,

Defendant.

ENTERED

JUN 16 2003

ORDER

A. Amendment of Prior Order Appointing Counsel

The order entered on June 3, 2003, appointing Richard Stephen Jaffe and William Marion Bowen, Jr., as counsel for Eric Robert Rudolph in all further proceedings herein,¹ is amended as follows.

1. Qualifications of Appointed Counsel

18 U.S.C. § 3005 requires that, at the outset of every capital case, the court before whom the defendant is to be tried appoint two attorneys, at least one of whom “shall be learned in the law applicable to capital cases.” The same statute instructs that, when “assigning counsel under this section, the court shall consider the recommendation of . . . the Administrative Office of United States Courts.” 18 U.S.C. § 3005.² Further, 21 U.S.C. § 848(q)(5) requires that at least one of the

¹ Doc. no. 4.

² In full text, 18 U.S.C. § 3005 reads as follows:

Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel; and the court before which the defendant is to be tried, or a judge thereof, shall promptly, upon the defendant’s request, assign 2 such counsel, of whom at least 1 shall be learned in the law applicable to capital cases, and who shall have free access to the accused at all reasonable hours. In assigning counsel under this section, the court shall consider the recommendation of the Federal Public Defender organization, or, if no such organization exists in the district, of the Administrative Office of the United States Courts. The defendant shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution.

attorneys appointed have been admitted to practice in the U.S. District Court for the Northern District of Alabama for not less than five years, and, have not less than three years of experience in the actual trial of felony prosecutions in this court.³ Finally, the *Guide to Judiciary Policies and Procedures*⁴ recommends that:

Courts should ensure that all attorneys appointed in federal death penalty cases are well qualified, by virtue of their prior defense experience, training and commitment, to serve as counsel in this highly specialized and demanding litigation. Ordinarily, “learned counsel” (see 18 U.S.C. § 3005) should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in *state* death penalty trials, appeals or post-conviction review that, in combination with co-counsel, will assure high-quality representation.

VII *Guide to Judiciary Policies and Procedures*, Part A (“Guidelines for the Administration of the Criminal Justice Act and Related Statutes”), Chapter VI (“Representation in Federal Death Penalty Cases and in Federal Capital Habeas Corpus Proceedings”), § 6.01(B)(1), at 3 (emphasis in original) (hereinafter, “*Administrative Guidelines*”).⁵ See also *Administrative Guidelines* Appendix I (Report of Defender Services Committee’s Subcommittee on Federal Death Penalty Cases, *Federal Death*

³ The title of 21 U.S.C. § 848(q) is misleading, suggesting that its provisions address only post-trial appeals in federal capital cases. Several subsections, however, speak to the appointment of counsel, and the provision of adequate investigative, expert, or other reasonably necessary services, “before judgment”: *e.g.*,

If the appointment is made *before judgment*, at least one attorney so appointed must have been admitted to practice in *the court in which the prosecution is to be tried* for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

21 U.S.C. § 848(q)(5) (emphasis supplied).

⁴ “The *Guide to Judiciary Policies and Procedures* is the official medium by which guidance and information is provided to the Judiciary in support of its day-to-day operations. The *Guide* also codifies policies which are promulgated by [the] Director of the AO [Administrative Office of United States Courts] and approved by the Judicial Conference of the United States.” I *Guide to Judiciary Policies and Procedures*, Chapter I, at 1.

⁵ Volume VII of the *Guide* generally addresses the “Appointment of Counsel in Criminal Cases”; and Part A of that volume contains the “Guidelines for the Administration of the Criminal Justice Act and Related Statutes” which were “promulgated by the Judicial Conference of the United States and concerns the appointment and compensation of attorneys, as well as payments for investigative, expert, and other services associated with the representation of persons under the Criminal Justice Act.” I *Guide to Judiciary Policies and Procedures*, Chapter I, at 2.

Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation) ¶

1(a) (“High quality legal representation is essential to assure fair and final verdicts, as well as cost-effective case management.”).

Information concerning the professional qualifications of Richard Jaffe and William Bowen in satisfaction of the foregoing requirements, as well as the recommendation of the Administrative Office of United States Courts, are included in “Appendix A” to this order.

2. Hourly rate of compensation

Mr. Jaffe and Mr. Bowen shall each be compensated for their services at the maximum hourly rate that may be awarded in capital cases pursuant to 21 U.S.C. § 848(q)(10)(A)⁶ and *Administrative Guidelines* § 6.02(A).⁷

⁶ The hourly rate of compensation that may be paid to appointed counsel in capital cases pursuant to statute presently is \$125.00 an hour:

Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than \$125 per hour for in-court and out-of-court time. *Not less than 3 years after April 24, 1996, the Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of Title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall percentages of such adjustments made since the last raise under this paragraph.*

21 U.S.C. § 848(q)(10)(A) (emphasis supplied).

⁷ *Administrative Guidelines* §§ 6.02(A)(1), (2) read as follows:

(1) **Hourly Rates.** Pursuant to 21 U.S.C. 848(q)(10)(A), with respect to federal death penalty cases . . . commenced . . . on or after April 24, 1996, the presiding judicial officer shall set the hourly compensation rate for appointed counsel in an amount not to exceed \$125 per hour for in-court and out-of-court time (*unless raised by the Judicial Conference in accordance with section 848(q)(10)(A).*).

. . .

(2) **Inapplicability of Compensation Maximums.** There is neither a statutory case compensation maximum for appointed counsel nor provision for review and approval by the chief judge of the circuit of the case compensation amount in capital cases.

<<http://156.119.80.10/library/guide/volume 7/chapter 6> (accessed June 16, 2003) (italicized emphasis added) (boldface

3. Forms for submission of interim vouchers

Claims for compensation and reimbursement of expenses incurred by appointed counsel during each calendar month shall be submitted on the twentieth day of each month (or the first business day thereafter, if the twentieth day is a Saturday, Sunday, or federal holiday) on **CJA Form 30**.⁸ Claims for payment of expenses incurred for investigative, expert, and other services shall be submitted on the same dates, *ex parte* and under seal, on **CJA Form 31**.⁹

4. Submission of proposed initial litigation budget

In accordance with the following provisions of *Administrative Guidelines* § 6.02(F), defense counsel are directed to prepare and file, *ex parte* and under seal, within twenty-one (21) days of the entry of this order, a proposed initial litigation budget stating the best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) likely to be needed through the time that the Department of Justice determines whether to authorize the death penalty:

Case Budgeting in Federal Capital Habeas Corpus Proceedings and Federal Death Penalty Cases. Courts are encouraged to require appointed counsel to submit a proposed initial litigation budget for court approval that will be subject to modification in light of facts and developments that emerge as the case proceeds. Case budgets should be submitted *ex parte* and filed and maintained under seal.

- (1) The budget should serve purposes comparable to those of private retainer agreements by confirming both the court's and the attorney's expectations regarding fees and expenses.

emphasis in original omitted).

In the event the proposal to raise the maximum hourly compensation for appointed counsel in capital cases that is currently pending before the Judicial Conference of the United States should be approved during the course of trial proceedings in this court, the hourly rate that may be charged by Messrs. Jaffe and Bowen will be increased accordingly.

⁸ *Administrative Guidelines* § 6.02(D) stipulates that "[c]laims for compensation and reimbursement of expenses for attorneys furnishing services in death penalty proceedings should be submitted on CJA Form 30, 'Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel.'"

⁹ *Administrative Guidelines* § 6.03(E) directs that "[c]laims for compensation and reimbursement of expenses for investigative, expert or other services in death penalty proceedings should be submitted on CJA Form 31, 'Death Penalty Proceedings: Ex Parte Request for Authorization and Voucher for Expert and Other Services.'"

- (2) Consideration should be given to employing an *ex parte* pretrial conference in order to facilitate reaching agreement on a litigation budget at the earliest opportunity.
- (3) The budget should be incorporated into a sealed initial pretrial order that reflects the understandings of the court and counsel regarding all matters affecting counsel compensation and reimbursement and payments for investigative, expert and other services, *including but not limited to the following matters*:
 - (a) The hourly rate at which counsel will be compensated (see paragraphs 6.02 A and B);^[10]
 - (b) In capital habeas corpus cases:
 - (c) In federal death penalty cases:

¹⁰ The relevant language of *Administrative Guidelines* § 6.02(A) is set out *supra* at note 7; § 6.02(B) (entitled “Attorney Compensation Recommendation”) reads as follows:

- (1) In the interest of justice and judicial and fiscal economy, and in furtherance of relevant statutory provisions regarding qualifications of counsel in capital cases (see paragraph 6.01 C), presiding judicial officers are urged to compensate counsel at a rate and in an amount sufficient to cover appointed counsel’s general office overhead and to ensure adequate compensation for representation provided. [Footnote continued on following page.]

In consideration of the potential for wide disparity in compensation paid to attorneys in federal death penalty cases and in federal capital habeas corpus proceedings, and for overburdening the Defender Services appropriation, it is recommended that presiding judicial officers limit the hourly rate for attorney compensation to between \$75 and \$125 per hour for in-court and out-of-court time. **With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996, the rate of compensation shall not exceed \$125 per hour for in-court and out-of-court time (unless revised by the Judicial Conference in accordance with 21 U.S.C. § 848(q)(10)(A)).**

- (2) If, following the appointment of counsel in a case in which a defendant was charged with an offense that may be punishable by death, it is determined that the death penalty will not be sought, the court may consider the question of the number of counsel needed and the rate of compensation needed for the duration of the proceeding. After considering whether the number of counsel initially appointed is necessary to assure effective representation or to avoid disruption of the proceeding, the court may continue such appointment or make an appropriate reduction. After considering the need to compensate appointed counsel fairly, taking into account the commitment of time and resources appointed counsel has made and will continue to make, the court may continue to pay the rate previously approved or prospectively reduce such rate.

Administrative Guidelines § 6.02(B) <<http://156.119.80.10/library/guide/volume 7/chapter 6> (accessed June 16, 2003) (boldface emphasis in original).

- i. Prior to prosecution decision to seek death penalty authorization: the best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) likely to be needed through the time that the Department of Justice determines whether to authorize the death penalty;
 - ii. After prosecution decision to seek death penalty authorization: the best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) likely to be needed through the guilt and penalty phases of the trial (in its discretion, the court may determine that defense counsel should prepared budgets for shorter intervals of time);
 - iii. Death penalty not sought: as soon as practicable after a decision not to seek the death penalty, the number of appointed counsel and hourly rate of compensation should be reviewed in accordance with subparagraph 6.02 B(2);
- (d) Agreement that counsel will advise the court of significant changes (counsel, expert, investigative, and other) to the estimates contained in the order;
- (e) Agreement on a date on which a subsequent ex parte case budget pretrial conference will be held;
- (f) Procedure and schedules for submission, review, and payment of interim compensation vouchers (see paragraphs 6.02 C^[11] and E^[12]);
- (g) The form in which claims for compensation and reimbursement should be submitted (see paragraph 6.02 D^[13]) and the matters that those submissions should address; and

¹¹ *Administrative Guidelines* § 6.02(C), pertaining to “Interim Payments to Counsel,” states: “It is urged that the court permit interim payment of compensation in capital cases.” See also *Administrative Guidelines* § 2.30(B) (“Presiding judicial officers are urged to permit interim payments in death penalty cases.”). The initial order appointing counsel entered on June 3, 2003, as amended by this order, directs defense counsel to submit interim CJA Form 30 vouchers to Chief Magistrate Judge T. Michael Putnam no later than the twentieth day of each month, or the first business day thereafter, if the twentieth day of a month is a Saturday, Sunday, or federal holiday.

¹² *Administrative Guidelines* § 6.02(E), pertaining to “Review of Vouchers” submitted by counsel, provides that, “[a]bsent extraordinary circumstances, judges should act upon panel attorney compensation claims within 30 days of submission.”

¹³ See *supra* note 8 for the text of *Administrative Guidelines* § 6.02(D).

(h) The authorization and payment for investigative, expert, and other services (see paragraph 6.03).

- (4) An approved budget should guide counsel's use of time and resources by indicating the services for which compensation is authorized. Case budgets should be re-evaluated when justified by changed or unexpected circumstances, and should be modified by the court where good cause is shown.

Administrative Guidelines § 6.02(F) (emphasis added).

Following submission of a proposed initial litigation budget in accordance with the foregoing guidelines, the court will set a date, time, and place for an *ex parte, in camera* conference with defense counsel to review the submission, and to reach agreement concerning tentative budgetary goals and procedures for interim payment of investigative and defense expert expenses. The budget will be reevaluated as changed or unexpected circumstances warrant. The proposed budget will remain under seal until the conclusion of proceedings in this court, at which time the court will entertain proposals for, or opposition to, unsealing the budget and actual compensation payments for public inspection.

B. Rulings on Pending Motions

The court has before it two motions filed by defendant *ex parte* and under seal. The first seeks authorization for the use of attorneys associated with attorney Richard S. Jaffe and the assistance of a paralegal,¹⁴ while the second seeks authorization to retain an investigator.¹⁵ Both

¹⁴ Doc. no. 9.

¹⁵ Doc. no. 10.

motions are considered under the provisions of 21 U.S.C. §§ 848(q)(4)(A)(i),¹⁶ (9),¹⁷ and (10).¹⁸ See also *Administrative Guidelines* § 6.03.¹⁹

Given the massive amount of investigative and forensic material compiled in this District, as well as the even more enormous quantity of material gathered in the Northern District of Georgia and the Western District of North Carolina that will require review for possible relevance to the defense, this court has little difficulty concluding that this case presents “exceptional circumstances,” and that “good cause” has been shown, within the meaning of *Administrative Guidelines* § 6.01(A)(1), to authorize Mr. Jaffe to utilize, at “a reduced hourly rate,” “the services of attorneys

¹⁶ 21 U.S.C. § 848(q)(4)(A)(i) provides, in pertinent part, that:

Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time . . . before judgment . . . shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

¹⁷ 21 U.S.C. § 848(q)(9) reads as follows:

(9) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant’s attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefore under paragraph (10). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

¹⁸ The relevant provisions of 21 U.S.C. § 848(q)(10) read as follows:

(10)(B) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9) shall not exceed \$7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active circuit judge.

(C) The amounts paid under this paragraph for services in any case shall be disclosed to the public, after the disposition of the petition.

¹⁹ The full text of *Administrative Guidelines* § 6.03 is included in “Appendix B” to this order.

who work in association with” him for the purpose of assisting appointed counsel in the work necessary to prepare this case for trial within a reasonable period of time, especially when this court anticipates that the use of such attorneys will reduce the ultimate cost of representation.²⁰ Thus, defendant’s motion for appointment of James Derek Drennan and H. Hube Dodd, Jr., is GRANTED, and it is ordered that such attorneys each be compensated at the reduced hourly rate of \$100.00 an hour.²¹

Defendant’s motions also seek authorization to employ a paralegal and an investigator to assist the defense. For the reasons already addressed, the court concludes that defendant is entitled to such services pursuant to 21 U.S.C. § 848(q)(9),²² subject to the \$7,500 limit imposed by § 848(q)(10)(B).²³ Accordingly, the motions for authorization to engage a paralegal and an investigator are GRANTED *nunc pro tunc* June 6, 2003, the date on which the subject motion was

²⁰ *Administrative Guidelines* § 6.01(A)(1), which addresses the “Number of Counsel” who may be appointed by the court, reads as follows:

Federal Death Penalty Cases. As required by 18 U.S.C. § 3005, at the outset of every capital case, courts should appoint two counsel, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases. Pursuant to 21 U.S.C. § 848(q)(4), if necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in such a case. While courts should not appoint more than two lawyers unless exceptional circumstances and good cause are shown, appointed counsel may, with prior court authorization, use the services of attorneys who work in association with them, provided that the employment of such additional counsel (at a reduced hourly rate) diminishes the total cost of representation or is required to meet time limits.

²¹ Compare, e.g., *Administrative Guidelines* § 6.02(B)(1) (stating, in part, that “presiding judicial; officers are urged to compensate counsel at a rate and in an amount sufficient to cover appointed counsel’s general office overhead and to ensure adequate compensation for representation provided”) with *id.* § 6.01(A)(1), *supra* note 20.

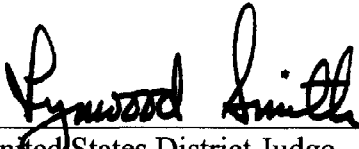
²² See *supra* note 17.

²³ See *supra* note 18.

filed.²⁴ The costs incurred for these services should be included within the proposed initial litigation budget counsel are to file in accordance with Part A(4) of this order.²⁵

The Clerk is DIRECTED to forward a copy of the foregoing order and the following appendices to all counsel of record.

DONE this 16th day of June, 2003, in Huntsville, Alabama.


United States District Judge

Attachments:

Appendix A Qualifications of Appointed Counsel

Appendix B *Administrative Guidelines* (Volume VII *Guide to Judiciary Policies and Procedures*, Part A (“Guidelines for the Administration of the Criminal Justice Act and Related Statutes”), Chapter VI (“Representation in Federal Death Penalty Cases and in Federal Capital Habeas Corpus Proceedings”))

²⁴ See *Administrative Guidelines* § 6.03(A) (providing, in part, that “upon a finding that timely procurement of necessary investigative, expert or other services could not await prior authorization, the presiding judicial officer may authorize such service *nunc pro tunc* consistent with paragraph 3.02 B”).

²⁵ Upon the filing and adoption of the proposed budget, the court anticipates seeking the prior approval of the chief judge of the circuit for expenditures in excess of the \$7,500 limit established by the *Administrative Guidelines*.

APPENDIX A

QUALIFICATIONS OF APPOINTED COUNSEL



LEONIDAS RALPH MECHAM
Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

CLARENCE A. LEE, JR.
Associate Director

WASHINGTON, D.C. 20544

June 2, 2003

THEODORE J. LIDZ
Chief

Defender Services Division

Via facsimile

Honorable C. Lynwood Smith Jr.
United States District Court
United States Post Office and
Courthouse
101 Holmes Avenue, N.E.
Huntsville, AL 35801

Dear Judge Smith:

Re: United States v. Eric Rudolph (N.D. AL)

I have reviewed the letter from Federal Death Penalty Resource Counsel David Bruck recommending the appointment of Richard S. Jaffe to this case. In making recommendations pursuant to 18 U.S.C. § 3005, the Administrative Office of the United States Courts generally defers to the expert advice of Federal Death Penalty Resource Counsel. In this instance, we have reviewed the detailed qualifications presented to you by David Bruck. It is unusual that we would have the opportunity to make a recommendation where the lawyer being recommended has the depth of experience (more than 50 capital cases, including two federal cases of which one was tried to sentencing verdict), along with experience in training death penalty lawyers that Mr. Jaffe possesses. Given the gravity and complexity of the above-captioned case, I am pleased that we were able to identify a defense lawyer of this caliber who is willing and available to undertake this representation.

I am happy to discuss this with you further at any time. I am on business travel through Wednesday, June 4th, but please do not hesitate to contact Judy Gallant of my office (202-502-2916) who will know how to get in touch with me.

Sincerely,

A handwritten signature in cursive script that reads "Steven Asin" followed by a stylized flourish.

Steven G. Asin
Deputy Chief

cc: David Bruck, Federal Death Penalty Resource Counsel

DAVID I. BRUCK
FEDERAL DEATH PENALTY RESOURCE COUNSEL

1247 Sumter Street, Suite 201
Columbia, South Carolina 29201

Mailing Address: P.O. Box 11744
Columbia, South Carolina 29211

Telephone: (803) 765-1044
Fax: (803) 765-1143
E-mail: david@brucklaw.com

June 2, 2003

Honorable C. Lynwood Smith, Jr.
United States District Judge
Hugo L. Black United States Courthouse
Birmingham AL 35203

VIA FACSIMILE

Re: United States v. Eric Rudolph

Dear Judge Smith,

As promised when we spoke earlier today, I write to provide the Court, as required by 18 U.S.C. § 3005, with the recommendation of the Administrative Office of the United States Courts respecting appointment of counsel in the above-referenced case.

I am pleased to recommend appointment of Richard S. Jaffe, Esq. as lead counsel in this case. Mr. Jaffe's resume follows. Mr. Jaffe served as lead counsel in United States v. Marvin Holley, the only other federal capital case to proceed through a jury sentencing hearing in Birmingham, and only the second such case in the Northern District of Alabama since Congress reinstated the death penalty in federal law. Mr. Jaffe's performance in the Holley case was exemplary. He is also a leader of the capital defense bar in Alabama, and his qualifications for this challenging assignment are unmatched. Mr. Jaffe is willing to accept this appointment.

Under the very unusual circumstances of this case, and given the Attorney General's representation earlier today that the defendant will be tried in the Northern District of Georgia after the Alabama prosecution is completed, I would also like to recommend that the Court appoint as co-counsel in the Alabama case the Federal Defender Program of the Northern District of Georgia. Ms. Stephanie Kearns, the Director of that Program, has indicated that she is willing for her office to assume representation in both districts (subject, of course, to the approval of the Court in her district).

I appreciate that the Court is considering appointment of additional counsel in Birmingham. While this complex and

Honorable C. Lynwood Smith, Jr.

June 2, 2003

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challenging case may well require such additional appointments, see VII GUIDE TO JUDICIARY POLICIES AND PROCEDURES: APPOINTMENT OF COUNSEL IN CRIMINAL CASES, Ch. 6.01.A(1) (noting statutory authorization for such additional appointments), I would respectfully recommend that the Court defer appointment of additional counsel at this time. The actual needs of the case will become clear soon enough, and the likelihood of assembling a cohesive and balanced team will be enhanced if these decisions are not compressed into the first days of the case.

I should mention that I have been contacted by Mr. Rudolph's current court-appointed counsel, Sean P. Devereux of Asheville, North Carolina, and Mr. Devereux has advised me that he concurs with the recommendations contained in this letter.

Thank you for the opportunity to make these statutory recommendations. If there is any other assistance in any matter respecting the defense function in this case that I may be able to render, I trust that you will not hesitate to contact me.

Yours truly,

David Bruck 1/24

David I. Bruck
Federal Death Penalty Resource Counsel

cc: Ted Lidz, Esq., Chief, Defender Serves Division, AOUSC
Sean P. Devereux, Esq.

RÉSUMÉ OF RICHARD S. JAFFE

Richard S. Jaffe is the owner and Senior Partner of the Birmingham, Alabama law firm of Jaffe, Strickland and Drennan, P.C. The firm concentrates in the area of criminal defense, with Mr. Jaffe specializing in the area of death penalty litigation. Admitted to the Bar in 1976, he has handled over fifty capital cases, including two federal death penalty cases. He has successfully defended three death row inmates at new trials after they had previously been sentenced to death. He was lead counsel in each of those cases.

Mr. Jaffe has been board certified by the National Board of Trial Advocacy as a Criminal Trial Specialist since January 31, 1984. He is licensed in Alabama, Georgia, New York, and Washington, D.C. While most of his law practice is concentrated in the State of Alabama, he lectures and teaches at death penalty conferences throughout the country, and is a faculty member of the Death Penalty College at Santa Clara, California, which trains death penalty lawyers. In 1994, the Alabama Bar Association awarded him the esteemed Clarence Darrow Award for the contributions he has made in defending indigent people charged with capital offenses. The Roderick Beddow Award, the Alabama Criminal Defense Lawyer Association's most prestigious award for service in the criminal defense field, was presented to Mr. Jaffe in the summer of 2002. It is awarded "in recognition of a lifetime achievement in the practice of criminal law."

Mr. Jaffe served as president of the Alabama Criminal Defense Lawyer's Association, and is a founder and past-president of the Greater Birmingham Criminal Defense Lawyer's Association. He is a member of the National Association of Criminal Defense Lawyers, Alabama Criminal

Defense Lawyers Association, Alabama Bar Association, Birmingham Bar Association and Co-Vice Chair of the Death Penalty Committee. He taught "Evidence" at the minority Miles Law School in Birmingham, Alabama for eight years.

Mr. Jaffe has published many articles and papers in connection with the training of attorneys. His February 2001 article in the *Champion* magazine was repeatedly cited in the Cornell Law Journal in a definitive study on jury selection in capital cases. It has been reprinted by several organizations that train death penalty lawyers.

A graduate of the University of Alabama and University of Alabama Law School, Mr. Jaffe maintains residences in Birmingham and Atlanta. He is divorced with one child.

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Richard S. Jaffe**Managing Partner**

Jaffe, Strickland & Drennan, P.C.

2320 Arlington Avenue

Birmingham, Alabama 35205

(Jefferson Co.)

Telephone: 205-930-9800

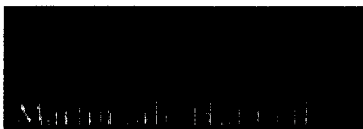
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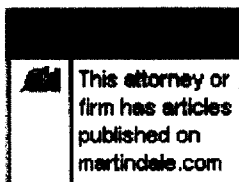
Rating Info**Practice Areas:** Personal Injury; Criminal Defense; White Collar Crime; Federal Litigation.**Admitted:** 1976, Alabama; 1982, New York; 1983, District of Columbia; 1984, Georgia and U.S. Supreme Court**Law School:** University of Alabama, J.D., 1976.**College:** University of Alabama, B.A., 1972.**Member:** Alabama State Bar; Alabama Criminal Defense Lawyers Association (President, 1990-1991); The Association of Trial Lawyers of America; National Association of Criminal Defense Lawyers; Greater Birmingham Criminal Defense Lawyers Association (President, 1998-1999).**Biography:** National Moot Court Team. Recipient, Alabama State Bar Clarence Darrow Award, 1994. Assistant Attorney General, State of Alabama, 1976-1977. Deputy District Attorney, Tuscaloosa County, 1977-1978. Member, Board of Directors, Miles Law School, 1983—. (Certified as a Criminal Trial Specialist by the National Board of Trial Advocacy)**Born:** Birmingham, Alabama, February 27, 1950.**ISLN:** 906209415**Web Site:** <http://www.jsd-pc.com>

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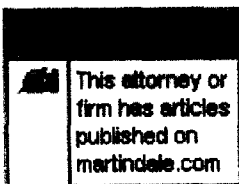
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APPENDIX B

ADMINISTRATIVE GUIDELINES

**Chapter VI. REPRESENTATION IN FEDERAL DEATH PENALTY CASES AND IN
FEDERAL CAPITAL HABEAS CORPUS PROCEEDINGS**

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CHAPTER VI. REPRESENTATION IN FEDERAL DEATH PENALTY CASES AND IN FEDERAL CAPITAL HABEAS CORPUS PROCEEDINGS

~~~~~The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, amended 21 U.S.C. § 848(q), in a manner that creates a two-tiered structure for the compensation of counsel and the approval and payment of persons providing investigative, expert, and other services in capital cases. The pertinent provisions of the AEDPA are applicable to capital cases commenced, and appellate proceedings in which an appeal is perfected, on or after the date of enactment of the AEDPA (April 24, 1996). Thus, this chapter retains guidelines applicable to cases that pre-date the AEDPA, and adds, where appropriate, new guidelines for cases subject to the AEDPA. Unless otherwise specified, provisions in this chapter apply to all capital cases.

NOTE REGARDING FEDERAL DEATH PENALTY CASES: Detailed recommendations concerning the appointment and compensation of counsel in federal death penalty cases were adopted by the Judicial Conference on September 15, 1998. Those recommendations, and accompanying commentary by the Defender Services Committee's Subcommittee on Federal Death Penalty Cases, are set forth in Appendix I to this volume. The complete report, entitled *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, is available on the judiciary's web site ([www.uscourts.gov](http://www.uscourts.gov)) or from the Defender Services Division of the AOUSC, 202-502-3030.

### 6.01 Appointment of Counsel in Capital Cases.

#### A. Number of Counsel.

- (1) Federal Death Penalty Cases. As required by 18 U.S.C. § 3005, at the outset of every capital case, courts should appoint two counsel, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases. Pursuant to 21 U.S.C. § 848(q)(4), if necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in such a case. While courts should not appoint more than two lawyers unless exceptional circumstances and good cause are shown, appointed counsel may, with prior court authorization, use the services of attorneys who work in association with them, provided that the employment of such additional counsel (at a reduced hourly rate) diminishes the total cost of representation or is required to meet time limits.
- (2) Habeas Corpus Proceedings. Pursuant to 21 U.S.C. § 848(q)(4), a financially eligible person seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. § 2254 or 2255 is entitled to appointment of one or more qualified attorneys. Due to the

complex, demanding and protracted nature of death penalty proceedings, judicial officers should consider appointing at least two counsel.

The judicial officer may appoint an attorney, if qualified under paragraph 6.01 C, who is furnished by a state or local public defender organization or by a legal aid agency or other private, non-profit organization to represent a person charged with a capital crime or seeking federal death penalty habeas corpus relief. Such appointments may be in place of, or in addition to, the appointment of a federal defender organization or a CJA panel attorney or an attorney appointed *pro hac vice* in accordance with paragraph 2.01 D of the *CJA Guidelines*. Such appointments should be made when the court determines that they will provide the most effective representation. In making this determination, the court should take into consideration whether the attorney represented the person during prior state court proceedings.

B. Procedures for Appointment in Federal Death Penalty Cases.

- .....(1) In appointing counsel in federal death penalty cases, the court shall consider the recommendation of the federal public defender, or, if no such organization exists in the district, of the Administrative Office of the United States Courts. In fulfilling this responsibility, the federal public defender organization or Administrative Office should consult with counsel (if counsel has already been appointed or retained) and the court regarding the facts and circumstances of the case to determine the qualifications which may be required to provide effective representation. In evaluating the qualifications of counsel considered for appointment, the federal public defender organization or Administrative Office should consider:
- (a) the minimum experience standards set forth in 21 U.S.C. § 848(q), 18 U.S.C. § 3005, and other applicable laws or rules;
  - (b) the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases;
  - (c) the recommendations of other federal public and community defender organizations, and local and national criminal defense organizations;



(d) the proposed counsel's commitment to the defense of capital cases; and

(e) the availability and willingness of proposed counsel to accept the appointment and to represent effectively the interests of the client.

---

Courts should ensure that all attorneys appointed in federal death penalty cases are well qualified, by virtue of their prior defense experience, training and commitment, to serve as counsel in this highly specialized and demanding litigation. Ordinarily, "learned counsel" (see 18 U.S.C. § 3005) should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in *state* death penalty trials, appeals or post-conviction review that, in combination with co-counsel, will assure high-quality representation.

(2) Federal Death Penalty Cases: Special Considerations in the Appointment of Counsel on Appeal. Ordinarily, the attorneys appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial. In appointing counsel the court should, among other relevant factors, consider:

(a) the attorney's experience in federal criminal appeals and capital appeals;

(b) the general qualifications identified in paragraph 6.01 B(1); and

(c) the attorney's willingness, unless relieved, to serve as counsel in any post-conviction proceedings that may follow the appeal.

(3) Federal Death Penalty Cases: Special Considerations in the Appointment of Counsel in Post-Conviction Proceedings. In appointing post-conviction counsel in a case where the defendant is sentenced to death, courts should consider the attorney's experience in federal post-conviction proceedings and in capital post-conviction proceedings, as well as the general qualifications identified in paragraphs 6.01 B(1) and 6.01 C(2).

C. Statutory Attorney Qualification Requirements.

(1) Appointment of Counsel Prior to Judgment. Pursuant to 21 U.S.C. § 848(q)(5), at least one of the attorneys appointed must

have been admitted to practice in the court in which the case will be prosecuted for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court. Pursuant to 18 U.S.C. § 3005, at least one of the attorneys appointed must be knowledgeable in the law applicable to capital cases.

- (2) Appointment of Counsel After Judgment. Pursuant to 21 U.S.C. § 848(q)(6), at least one of the attorneys appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in felony cases in the court.
- (3) Attorney Qualification Waiver. Pursuant to 21 U.S.C. § 848(q)(7), the presiding judicial officer, for good cause, may appoint an attorney who may not qualify under 21 U.S.C. § 848(q)(5) or (q)(6), but who has the background, knowledge, and experience necessary to represent the defendant properly in a capital case, giving due consideration to the seriousness of the possible penalty and the unique and complex nature of the litigation.

D. Continuity of Representation.

- (1) In the interest of justice and judicial and fiscal economy, unless precluded by a conflict of interest, presiding judicial officers are urged to continue the appointment of state post-conviction counsel, if qualified under paragraph 6.01 C, when the case enters the federal system.
- (2) Section 848(q)(8) of title 21, U.S.C., provides that, unless replaced by an attorney similarly qualified under paragraph 6.01 C pursuant to counsel's own motion or upon motion of the defendant, counsel shall represent the defendant in every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motion for a new trial, appeal, application for a writ of certiorari to the Supreme Court of the United States, all post-conviction proceedings, applications for stays of execution, competency proceedings, proceedings for executive or other clemency, and other appropriate motions and proceedings.

6.02 Compensation of Appointed Counsel in Capital Cases.

A. Inapplicability of CJA Hourly Rates and Compensation Maximums.

- (1) **Hourly Rates.** Pursuant to 21 U.S.C. § 848(q)(10)(A), **with respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996,** the presiding judicial officer shall set the hourly compensation rate for appointed counsel in an amount not to exceed \$125 per hour for in-court and out-of-court time (unless raised by the Judicial Conference in accordance with section 848(q)(10)(A)).

**For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996,** in accordance with 21 U.S.C. § 848(q)(10) prior to that provision's amendment by the Antiterrorism Act, an attorney appointed to represent a defendant charged with a federal capital crime or seeking to vacate or set aside a death sentence in a proceeding under section 2254 or 2255 of title 28, U.S.C., shall be compensated at a rate and in an amount determined exclusively by the presiding judicial officer to be reasonably necessary to obtain qualified counsel to represent the defendant, without regard to CJA hourly rates or compensation maximums.

- (2) **Inapplicability of Compensation Maximums.** There is neither a statutory case compensation maximum for appointed counsel nor provision for review and approval by the chief judge of the circuit of the case compensation amount in capital cases.

B. **Attorney Compensation Recommendation.**

- (1) In the interest of justice and judicial and fiscal economy, and in furtherance of relevant statutory provisions regarding qualifications of counsel in capital cases (see paragraph 6.01 C), presiding judicial officers are urged to compensate counsel at a rate and in an amount sufficient to cover appointed counsel's general office overhead and to ensure adequate compensation for representation provided.

In consideration of the potential for wide disparity in compensation paid to attorneys in federal death penalty cases and in federal capital habeas corpus proceedings, and for overburdening the Defender Services appropriation, it is recommended that presiding judicial officers limit the hourly rate for attorney compensation to between \$75 and \$125 per hour for in-court and out-of-court time. **With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996,** the rate

of compensation shall not exceed \$125 per hour for in-court and out-of-court time (unless revised by the Judicial Conference in accordance with 21 U.S.C. § 848(q)(10)(A)).

- (2) If, following the appointment of counsel in a case in which a defendant was charged with an offense that may be punishable by death, it is determined that the death penalty will not be sought, the court may consider the question of the number of counsel needed and the rate of compensation needed for the duration of the proceeding. After considering whether the number of counsel initially appointed is necessary to ensure effective representation or to avoid disruption of the proceeding, the court may continue such appointments or make an appropriate reduction. After considering the need to compensate appointed counsel fairly, taking into account the commitment of time and resources appointed counsel has made and will continue to make, the court may continue to pay the rate previously approved or prospectively reduce such rate.
- C. Interim Payments to Counsel. It is urged that the court permit interim payment of compensation in capital cases. (See generally paragraph 2.30 B concerning interim payments to counsel in death penalty cases.)
- D. Forms. Claims for compensation and reimbursement of expenses for attorneys furnishing services in death penalty proceedings should be submitted on CJA Form 30, "Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel."
- E. Review of Vouchers. Absent extraordinary circumstances, judges should act upon panel attorney compensation claims within 30 days of submission.
- F. Case Budgeting in Federal Capital Habeas Corpus Proceedings and Federal Death Penalty Cases. Courts are encouraged to require appointed counsel to submit a proposed initial litigation budget for court approval that will be subject to modification in light of facts and developments that emerge as the case proceeds. Case budgets should be submitted *ex parte* and filed and maintained under seal.
- (1) The budget should serve purposes comparable to those of private retainer agreements by confirming both the court's and the attorney's expectations regarding fees and expenses.
  - (2) Consideration should be given to employing an *ex parte* pretrial conference in order to facilitate reaching agreement on a litigation budget at the earliest opportunity.

- (3) The budget should be incorporated into a sealed initial pretrial order that reflects the understandings of the court and counsel regarding all matters affecting counsel compensation and reimbursement and payments for investigative, expert and other services, including but not limited to the following matters:

(a) The hourly rate at which counsel will be compensated (see paragraphs 6.02 A and B);

(b) In capital habeas corpus cases: the best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) for the entire case (in its discretion, the court may determine that defense counsel should prepare budgets for shorter intervals of time);

(c) In federal death penalty cases:

..... i. Prior to prosecution decision to seek death penalty authorization: the best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) likely to be needed through the time that the Department of Justice determines whether to authorize the death penalty;

..... ii. After prosecution decision to seek death penalty authorization: the best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) likely to be needed through the guilt and penalty phases of the trial (in its discretion, the court may determine that defense counsel should prepare budgets for shorter intervals of time);

iii. Death penalty not sought: as soon as practicable after a decision not to seek the death penalty, the number of appointed counsel and hourly rate of compensation should be reviewed in accordance with subparagraph 6.02 B(2);

..... (d) Agreement that counsel will advise the court of significant changes (counsel, expert, investigative, and other) to the estimates contained in the order;

----- (e) Agreement on a date on which a subsequent *ex parte* case budget pretrial conference will be held;

(f) Procedure and schedules for submission, review, and payment of interim compensation vouchers (see paragraphs 6.02 C and E);

(g) The form in which claims for compensation and reimbursement should be submitted (see paragraph 6.02 D) and the matters that those submissions should address; and

(h) The authorization and payment for investigative, expert, and other services (see paragraph 6.03).

----- (4) An approved budget should guide counsel's use of time and resources by indicating the services for which compensation is authorized. Case budgets should be re-evaluated when justified by changed or unexpected circumstances, and should be modified by the court where good cause is shown.

G. Case Management in Federal Capital Habeas Corpus Proceedings. Judges are encouraged to employ the case-management techniques used in complex civil litigation to control costs in federal capital habeas corpus cases.

6.03 Authorization and Payment for Investigative, Expert and Other Services in Capital Cases.

A. In General. With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996, upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, the court should authorize the defendant's attorneys to obtain such services. No *ex parte* request for

investigative, expert, or other services in such cases may be considered unless, a proper showing is made by counsel concerning the need for confidentiality.

**For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996,** in accordance with 21 U.S.C. § 848(q)(9) prior to that provision's amendment by the AEDPA, upon a finding in *ex parte* proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the presiding judicial officer shall authorize the defendant's counsel to obtain such services on behalf of the defendant.

For all capital cases, upon a finding that timely procurement of necessary investigative, expert or other services could not await prior authorization, the presiding judicial officer may authorize such services *nunc pro tunc* consistent with paragraph 3.02 B.

Except as otherwise specified in paragraph 6.03, the provisions set forth in Chapter III are applicable to the authorization and payment for investigative, expert, and other services in capital cases.

- B. **AEDPA Limitation: Inapplicability to Pre-AEDPA Cases** For all capital cases, the compensation maximum set forth in paragraph 3.02 A of these guidelines is inapplicable.

**With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996,** pursuant to 21 U.S.C. § 848(q)(10)(B), the fees and expenses for investigative, expert, and other services are limited to \$7,500 in any case unless payment in excess of that amount is certified by the court, or magistrate judge if the services were rendered in connection with a case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit (or an active circuit judge to whom the chief judge has delegated this authority). The \$7,500 limit applies to the total payments for investigative, expert, and other services in a case, not to each service individually.

Once payments for investigative, expert, and other services total \$7,500, then additional payments must be approved by the chief judge of the circuit (or an active circuit judge to whom the chief judge has delegated this authority). Accordingly, the court shall monitor all payments for investigative, expert, and other services.

If it can be anticipated that the payments for investigative, expert, and other services will exceed the statutory maximum, advance approval should be obtained from the court and the chief judge of the circuit (or an active circuit judge to whom the chief judge has delegated this authority). See sample form, Appendix C. Rather than submitting multiple requests, where possible, courts should submit the expert, investigative and other services portion of the approved case budget (see paragraph 6.02 F) to the chief judge of the circuit (or his or her designee) for advance approval.

**For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996,** in accordance with 21 U.S.C. § 848(q)(10) prior to that provision's amendment by the AEDPA, the presiding judicial officer shall set compensation for investigative, expert, and other services in an amount reasonably necessary to obtain such services, without regard to CJA or AEDPA maximum limitations.

- C. Consulting Services in Federal Capital Habeas Corpus Cases and in Federal Death Penalty Cases. Where necessary for adequate representation, subsection (e) of the CJA and 21 U.S.C. § 848(q)(9) authorize the reasonable employment and compensation of expert attorney consultants to provide “light consultation” services to appointed and *pro bono* lawyers in federal capital habeas corpus cases and in federal death penalty cases in such areas as records completion, determination of need to exhaust state remedies, identification of issues, review of draft pleadings and briefs, authorization process to seek the death penalty, etc. “Light consultation” services are those that a lawyer in private practice would typically seek from another lawyer who specializes in a particular field of law, as opposed to “heavy consultation” services, which include, but are not limited to, reviewing records, researching case-specific legal issues, drafting pleadings, investigating claims, and providing detailed case-specific advice to counsel, if such tasks take a substantial amount of time.

An expert attorney consultant shall not be paid an hourly rate exceeding that which an appointed counsel could be authorized to be paid.

Courts may wish to require that an appointed counsel who seeks to have the court authorize the services of an expert attorney consultant confer with the federal defender, or the Administrative Office’s Defender Services Division if there is no federal defender in the district or if the federal defender has a conflict of interest, regarding who could serve as an expert attorney consultant.

- D. Interim Payments to Persons Providing Investigative, Expert and Other Services. It is urged that the court or magistrate judge permit interim payment of compensation in capital cases.



**With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996, 21 U.S.C. § 848(q)(10)(B), as amended, provides a \$7,500 payment maximum for the total cost of fees and expenses for investigative, expert, and other services. A special set of procedures for effecting interim payments, including a special memorandum order, must be used in these cases. These procedures and a sample memorandum order are set forth in Appendix F, beginning on page F-11. (See also the case budgeting techniques recommended in paragraph 6.02 F.) Other interim payment arrangements which effectuate a balance between the interest in relieving service providers of financial hardships and the practical application of the statutorily imposed responsibility of the chief judge of the circuit to provide a meaningful review of claims for excess payment may be devised in consultation with the Defender Services Division of the Administrative Office of the United States Courts.**

**For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996, there are no expert services maximums. A separate set of procedures for effecting interim payments, including a separate memorandum order, must be used in those cases. These procedures and sample memorandum order are set forth in Appendix F, beginning on page F-7.**

- E. Forms. Claims for compensation and reimbursement of expenses for investigative, expert or other services in death penalty proceedings should be submitted on CJA Form 31, "Death Penalty Proceedings: *Ex Parte* Request for Authorization and Voucher for Expert and Other Services."
- F. Review of Vouchers. Absent extraordinary circumstances, judges should act upon claims for compensation for investigative, expert, or other services within 30 days of submission.